

1 Alan S. Gutman, SBN 128514
2 John Juenger, SBN 225201
3 LAW OFFICES OF ALAN S. GUTMAN
4 9401 Wilshire Boulevard, Suite 575
5 Beverly Hills, CA 90212-2918
6 Telephone: 310-385-0700
7 Facsimile: 310-385-0710
8 email: alangutman@gutmanlaw.com
9 jjjuenger@gutmanlaw.com

10 Attorneys for Defendant and Counter-Claimant
11 THIERRY GUETTA a/k/a MR. BRAINWASH

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 GLEN E. FRIEDMAN,

15 Plaintiff,

16 vs.

17 THIERRY GUETTA a/k/a MR.
18 BRAINWASH, and DOES 1 through
19 10, inclusive,

20 Defendants.

21 AND RELATED COUNTER-CLAIM.

Case No. CV10-0014 DDP (JCx)

**DEFENDANT THIERRY GUETTA'S
OPPOSITION TO PLAINTIFF GLEN E.
FRIEDMAN'S MOTION FOR SUMMARY
ADJUDICATION**

[FILED CONCURRENTLY WITH STATEMENT
OF GENUINE ISSUES; DECLARATIONS OF
THIERRY GUETTA AND ALAN S. GUTMAN]

Date: May 9, 2011

Time: 10:00 a.m.

Ctrm: 3

**HON. DEAN D. PREGERSON
UNITED STATES DISTRICT JUDGE**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Plaintiff Glen E. Friedman ("Friedman") has failed to meet his burden of production
4 in his motion for summary adjudication on his claim for copyright infringement against
5 Defendant Thierry Guetta ("Guetta"). Friedman does not provide any evidence or argument
6 suggesting that Guetta's use of aspects of a photograph Friedman took in 1985 of the hip-
7 hop group Run-DMC (the "Photograph") is substantially similar to the protected elements
8 of the Photograph. Friedman argues that he does not need to address this essential
9 element of copyright analysis because Guetta has admitted to "copying." This is simply not
10 the case. Guetta has only admitted to using certain aspects of the Photograph and has
11 provided evidence that those aspects were altered in various manners, including color,
12 tone, sizing, etc. This does not constitute an admission of copying for copyright purposes.
13 Moreover, the two cases Friedman cites in support of his argument that one need not
14 prove substantial similarity when the defendant has admitted to copying concern the
15 publication of verbatim quotes from unpublished literary sources in subsequent pieces of
16 literature. Obviously, copying exact language from one literary source and printing it in
17 another is completely different from the incorporation of some aspects of a Photograph
18 (that have been altered) into different artistic mediums. Additionally, Friedman does not
19 address whether Guetta's works constitute fair use. Despite having been aware that Guetta
20 would argue fair use, Friedman does not offer any explanation for his failure to address this
21 key component of copyright infringement. Friedman has therefore failed to meet his burden
22 of production and the motion for summary adjudication must be denied on those grounds
23 alone.

24 Out of an abundance of caution, this opposition also sets forth evidence and
25 analysis demonstrating that Guetta's works do not constitute copyright infringement as they
26 are not substantially similar to the protected aspects of Friedman's Photograph and that
27 Guetta's use of the Photograph was fair, arguments that are also set forth in Guetta's
28 motion for summary judgment, scheduled to be heard on the same date as the instant

1 motion.

2 **II. STATEMENT OF FACTS**

3 **A. BACKGROUND AND WORKS INCORPORATING THE PHOTOGRAPH**

4 Guetta is a world renowned artist that sometimes goes by "Mr. Brainwash."
 5 Defendant's Additional Material Fact ("DMF") No. 1. Guetta's first major art showing, which
 6 was called "Life is Beautiful," was a massive art installation at a former CBS studio in
 7 Hollywood, California. DMF No. 2. "Life is Beautiful" ran from June 18, 2008 until August
 8 31, 2008. DMF No. 3. The show included about 200 works Guetta created, including
 9 paintings, sculptures, a 20 foot tall robot constructed out of televisions and metal, and
 10 various other works of differing sizes and mediums. DMF No. 4. Guetta was not paid to
 11 put on the show, rather, he paid to rent the space, for demolition, security and so on. DMF
 12 No. 5. At all times, admission to "Life is Beautiful" was free to the public and no
 13 concessions were sold. DMF No. 6. Other than selling his art, Guetta did not offer any
 14 goods or services in connection with the "Life is Beautiful" show and could not profit in any
 15 other manner therefrom. DMF No. 7. In addition to the other approximately 200 pieces
 16 were a few works Guetta created in part by using the unprotectable aspects of the
 17 Photograph of Run-DMC taken by Friedman of the hip-hop group Run-DMC. DMF No. 8.

18 The Photograph consists of the three members of Run-DMC staring at the camera
 19 and posing with bravado: one of the group's members is cupping his fist with his other
 20 hand and another member has his arms folded. DMF No. 9. Each member's face has a
 21 serious look that may described as "tough." Id. Each member of Run-DMC is wearing a
 22 black Stetson hat, a style of dress the group was and is well known for. DMF No. 10. The
 23 background of the Photograph is a brick building in Hollis, Queens. DMF No. 11.

24 The works Guetta created using the Photograph were created in four distinct
 25 manners. What shall be referred to herein as the "Old Photo Work" was created out of a
 26 19th century photograph of a family of four people. DMF No. 12. Guetta purchased the
 27 19th century photograph at a flea market in Paris. DMF No. 13. After being scanned into
 28 a digital format, two of the family members were removed and replaced with the images

1 of two of the members of Run-DMC from the digital image of the Photograph.¹ DMF No.
 2 14. The 19th century photograph made up the majority of the Old Photo Work and other
 3 than the removal of two of the family members, essentially no aspects from the older
 4 photograph were omitted. DMF No. 16. Guetta also caused one of the Stetson hats that
 5 the members of Run-DMC were wearing to be placed on one of the unknown persons in
 6 the Old Photo Work so as to make it appear that he was wearing the same style of hat.
 7 DMF No. 17. The images of the two Run-DMC members from the Photograph were
 8 digitally altered so as to make them more slender, smaller and to change their relative
 9 positions, thereby making their inclusion in the older photograph more spatially appropriate.
 10 DMF No. 18. Additionally, while the images of Run-DMC were crisp in the Photograph, the
 11 two members' features were made more dull in the Old Photo Work so as to create the
 12 sense that the Run-DMC members were present with the family when the 19th century
 13 photograph was taken. DMF No. 19. The entire image in the Old Photo Work, including the
 14 two members of Run-DMC, had a sepia tone, whereas the Photograph was a more
 15 standard black and white. DMF No. 20. An image of an oval near the Old Photo Work's
 16 perimeter gave the piece the appearance of an old photograph that had been in a frame
 17 with an oval window for some time and subsequently removed. DMF No. 21. None of the
 18 background from the Photograph was used in the Old Photo Work. DMF No. 22.

19 Guetta created prints of the Old Photo Work for sale, some of which were sold
 20 during the two and a half month run of the "Life is Beautiful" show and some of which were
 21 sold on Guetta's website. DMF No. 23. Guetta has not offered the Old Photo Work prints
 22 for sale since well before the instant litigation began. DMF No. 24. Postcards incorporating
 23 the image were created, but were not used for promotion of the show and were instead
 24 given as a memento to people after they attended the show. UF. No. 25. 46 other
 25 postcards bearing images of Guetta's artwork that did not incorporate the Photograph were
 26 also created and distributed in the same manner. DMF No. 26.

27 _____
 28 ¹ Any of the digital alterations herein referenced were performed by a
 graphic artist at Guetta's direction. DMF No. 15.

1 The second category of work incorporating the Photograph was a “one-off” (only one
 2 was created, no reproductions were made) depicting Run-DMC made from vinyl shards of
 3 broken records (the “Broken Records Work”). DMF No. 27. To create the Broken Records
 4 Work, Guetta caused a digital image of the Photograph to be altered so as to remove most
 5 of the detail from its subjects, leaving an outline of the group’s features. DMF No. 28. Any
 6 shadings and/or subtleties created by Friedman’s artistic decisions as a photographer
 7 (such as lighting, shutter-speed, etc.) were entirely eliminated. Id. The background of the
 8 Photograph was discarded. DMF No. 29. Guetta then had the image projected onto a large
 9 piece of wood and painted the image onto the wood. DMF No. 30. Thereafter, Guetta
 10 glued more than 1,000 pieces of broken phonograph records onto the painted wood. DMF
 11 No. 31. The result was a three-dimensional image of Run-DMC created entirely from
 12 broken records. DMF No. 32. The use of broken vinyl gave the Broken Records Work a
 13 fragmented appearance. DMF No. 33. The Broken Records Work further deviated from the
 14 Photograph in that towards the bottom the image of Run-DMC appeared to be dripping.
 15 DMF No. 34. The Broken Records Work was never offered for sale. Other than the “Life
 16 is Beautiful” show, the Broken Records Work was never displayed or in any manner
 17 marketed by Guetta. DMF No. 35.

18 The third category of works incorporating the Photograph involved the use of a
 19 stencil (the “Stencil Works”). As with the Broken Records Work, a digital image of the
 20 Photograph was altered so as to remove any shading and nuance. DMF No. 36.
 21 Additionally, the image was altered so that it could be made into a one piece stencil,
 22 meaning Guetta had to make decisions as to whether and how certain features could be
 23 incorporated.² DMF No. 37. Thereafter, the image was printed on high-quality, rigid paper
 24 and Guetta cut the paper to create the stencil. DMF No. 38. As with the other works, the
 25

26 ² In order to create a single stencil, the artist must ensure that every aspect
 27 of the image is connected by a “bridge.” Accordingly, for portions of the image that
 28 were not near other portions (e.g. a band member’s eye), Guetta had to determine how
 to bridge that feature to others so as to ensure a one-piece stencil could be created.
 DMF No. 37.

1 background of the Photograph was not incorporated in any manner. DMF No. 39. Guetta
2 placed the stencil on top of the three canvases with different backgrounds and used black
3 spay paint to superimpose the image of Run-DMC. DMF No. 40. Only the Stencil Work
4 found at Exhibit G, the piece on the white background with graffiti, was ever displayed by
5 Guetta, the other two works were left in storage and never displayed or marketed. DMF No.
6 41. The Stencil Works were never offered for sale in any manner or otherwise used to
7 promote Guetta or his work. DMF No. 42.

8 The fourth and final category of work incorporating the Photograph was a painted
9 banner of the members of Run-DMC (the Banner Work), which was also a one-off.
10 DMF No. 43. Again, an image incorporating the members of Run-DMC from the
11 Photograph with the shading and other nuances removed was projected onto a canvas and
12 then the image was hand-painted onto the canvas. DMF No. 44. Accordingly, the decisions
13 Friedman made as a photographer, such as lighting and type of film, were not incorporated
14 into the Banner Work, which used only one color (black) of acrylic paint. DMF No. 45. The
15 image of Run-DMC is dripping at the bottom. DMF No. 46.

16 The Banner Work was sold prior to the "Life is Beautiful" show, but was displayed
17 at the "Life is Beautiful" show and during a three-day music festival in Autumn 2008 in New
18 York. DMF No. 47. As with the Old Photo Work, postcards incorporating the image were
19 created, but were not used for promotion of the show and were instead given as a
20 keepsake to people after they attended the show. DMF No. 48.

21 **B. THE PHOTOGRAPH**

22 Friedman testified that he took the Photograph around November 1985. DMF No.
23 49. Friedman stated that he chose the shoot's location. DMF No. 50. Friedman testified
24 that he did not provide Run-DMC with the hats worn in the Photograph and that Run-DMC
25 had been previously photographed with such hats. DMF No. 51. While Friedman testified
26 that he may have participated in some of the wardrobe choices, he conceded that the cold
27 weather played a role in what Run-DMC was wearing. DMF No. 52. Friedman further
28 testified that the group had often worn matching or similar outfits prior his taking the

1 Photograph. DMF No. 53. Friedman stated that he did not develop the Photograph. DMF
 2 No. 54. Friedman explained that since Run-DMC's music inspired him, he wanted to
 3 express this inspiration to others and inspire them as much as possible by means of the
 4 Photograph. DMF No. 55. Friedman testified that no one has told him that they would not
 5 license or purchase the Photograph because of Guetta's use. DMF No. 56.

6 There are many photographs of Run-DMC from the 1980's that are similar to
 7 Friedman's Photograph, including the style of clothing, pose, demeanor and background.
 8 DMF No. 57. Run-DMC's eponymous debut album, which was released the year before
 9 the Photograph was taken, depicts two of the members of the group in black Stetson hats
 10 giving "tough" looks to the camera in essentially the same vein as they do in the
 11 Photograph. DMF No. 58. Friedman does not own any of Run-DMC's rights of publicity.
 12 DMF No. 59.

13 **III. LEGAL ARGUMENT**

14 **A. FRIEDMAN HAS FAILED TO MEET HIS BURDEN OF PRODUCTION**

15 Friedman, as the party moving for summary adjudication, has the initial burden of
 16 establishing that there is "no genuine issue as to any material fact and that the movant is
 17 entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); British Airways Bd. v. Boeing
 18 Co., 585 F.2d 946, 951 (9th Cir. 1978) ("[The] burden of establishing that there is no
 19 genuine issue of material fact lies initially with the moving party ... "). Where the moving
 20 party fails to carry his initial burden of production, the opposing party "has no obligation to
 21 produce anything ... " Nissan Fire & Marine Ins. Co. v. Gritz Cos., 210 F.3d 1099,
 22 1102-1103 (9th Cir. 2000). To warrant summary judgment, a plaintiff must present
 23 evidence affirmatively showing that no reasonable jury could find for the non-moving party
 24 for all essential elements of its case. Miller v. Glenn Miller Prod., Inc., 454 F.3d 975, 987
 25 (9th Cir. 2006).

26 Thus, in moving for summary adjudication on his claim for copyright infringement,
 27 Friedman must prove that there is no issue of material fact that Guetta "copied **protected**
 28 **elements** of the plaintiff's work." Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th

1 Cir. 2000) (emphasis added). Copying may be established by showing that the two works
 2 “are substantially similar in their protected elements.” Metcalf v. Bochco, 294 F.3d 1069,
 3 1072 (9th. Cir. 2002).

4 Rather than submitting evidence and argument to demonstrate that Guetta’s uses
 5 are substantially similar to the protected aspects of the Photograph (and establishing that
 6 no reasonable jury could possibly find that their protected elements are not substantially
 7 similar), Guetta contends that he does not have to argue substantial similarity, because
 8 Guetta supposedly “admits to verbatim copying.” Friedman’s Motion for Summary
 9 Adjudication, 9:16. In support of this argument, Friedman cites Harper & Row Publishers,
 10 Inc. v. Nation Enterprises, 471 U.S. 539, 548-549 and Norse v. Henry Holt & Co., 991 F.2d
 11 563, 566 (9th Cir. 1993). Both of those cases involved the publication of verbatim quotes
 12 from unpublished literary sources in subsequent pieces of literature (thus implicating the
 13 right of first publication protection afforded by the Copyright Act). In Harper & Row, the
 14 defendant magazine published an article incorporating passages from President Ford’s
 15 then unpublished memoirs. Norse concerned the incorporation of language from
 16 unpublished letters in a William S. Burroughs biography. Friedman does not cite any cases
 17 in support of his proposition that do not concern direct copying of language in literary
 18 materials.

19 Guetta has not admitted to “copying.” Nowhere in the cited deposition testimony or
 20 language from the declaration Guetta submitted in support of his Motion for Summary
 21 Judgment or, in the Alternative, Partial Summary Judgment does Guetta indicate that he
 22 “copied” the Photograph. Rather, Guetta explains how he incorporated certain aspects of
 23 the Photograph into his works through various methods depending on which work is being
 24 discussed. Each of these methods included substantial alteration of the aspects of the
 25 Photograph that were incorporated, such as changing color, tone, clarity, sizing and so on,
 26 and incorporating them into a visual medium different than that of a photograph. For
 27 instance, Guetta caused an image of the Photograph with all of its nuances removed
 28 (leaving essentially an outline) to be projected onto a piece of wood and then painted that

1 image. This is entirely different from copying exact language from one literary source and
 2 printing it in another. Guetta did not admit to “verbatim copying.” Friedman’s argument may
 3 hold some weight if Guetta simply glued the Photograph onto his artworks, but that is not
 4 what transpired. Unlike the situations in Harper & Row and Norse, where verbatim copying
 5 of the copyrighted material was inserted into the infringing works, here Guetta clearly
 6 altered the aspects of the Photograph that were incorporated into his works. Friedman’s
 7 failure to address this is fatal to his summary adjudication motion. Additionally, as
 8 Friedman has argued that Guetta’s works are “derivative works,” a substantial similarities
 9 analysis must be undertaken. See Allen v. Academic Games League of America, Inc., 89
 10 F.3d 614, 617 (1996) (“[The plaintiff] asserts that to constitute a derivative work, the
 11 infringing work need only incorporate in some form a portion of the copyrighted material.
 12 This court, however, has consistently held that to prove infringement, one must
 13 demonstrate substantial similarity between the works. Litchfield v. Spielberg, 736 F.2d
 14 1352, 1355 (9th Cir.1984), cert. denied, 470 U.S. 1052, 105 S.Ct. 1753, 84 L.Ed.2d 817
 15 (1985).” Accordingly, Friedman is not absolved from proving substantial similarity between
 16 the protected elements of the Photograph and Guetta’s use, and his refusal to even
 17 attempt to do so constitutes a failure to meet his burden of production. For this reason
 18 alone, Friedman’s motion for summary adjudication must be denied.

19 Moreover, even assuming Friedman did not have to demonstrate substantial
 20 similarity, he must nonetheless prove that no reasonable jury could find that Guetta’s works
 21 incorporating aspects of the Photograph were “fair use.” When an alleged infringer’s use
 22 is fair it “is not an infringement of copyright.” 17 U.S.C. § 107. As Friedman did not submit
 23 any evidence to demonstrate that Guetta’s use was not fair, he has failed to meet his
 24 burden of production and Guetta is not required to provide anything in response. Friedman
 25 was well aware that Guetta would argue fair use because Guetta specifically indicated as
 26 much in his motion to compel further responses to discovery. DMF No. 60. Friedman’s
 27 motion for summary adjudication does not provide any excuse for completely ignoring this
 28 essential aspect of the case.

1 For these reasons, Friedman has failed to meet his burden of production. His motion
2 for summary adjudication should be denied on those grounds.

3 **B. GUETTA DID NOT INFRINGE ON THE PHOTOGRAPH'S COPYRIGHT AS**
4 **HIS WORKS DID NOT INCORPORATE PROTECTED ASPECTS**

5 Even if Friedman were somehow relieved of his burden of production, his motion for
6 summary adjudication fails as Guetta's works do not incorporate the protected aspects of
7 the Photograph. Guetta has moved for summary judgment (or partial summary judgment
8 as to each particular category of work) in his favor in this regard. For purposes of this
9 motion, however, Guetta need only show that there is a triable issue regarding substantial
10 similarity.

11 While a two-part analysis (an extrinsic test and an intrinsic test) is applied at trial to
12 determine whether two works are substantially similar, "a plaintiff who cannot satisfy the
13 extrinsic test necessarily loses on summary judgment, because a jury may not find
14 substantial similarity without evidence on both the extrinsic and intrinsic tests." Kouf, supra,
15 16 F.3d at 1045. The extrinsic test "considers whether two works share a similarity of ideas
16 and expression based on external, objective criteria." Smith v. Jackson, 84 F.3d 1213,
17 1218 (9th Cir. 1996). "In applying the extrinsic test, we must distinguish between the
18 protectable and unprotectable material because a party claiming infringement may place
19 'no reliance upon any similarity in expression resulting from unprotectable elements.'" Rice
20 v. Fox Broadcasting Co., 330 F.3d 1170, 1174 (9th Cir. 2003) quoting Apple Computer,
21 supra, 35 F.3d at 1446. Once the court has determined the amount of protected attributes
22 of the original work that have been incorporated into the allegedly infringing work, the court
23 then applies any limiting doctrines, such as *scènes à faire* (discussed below). Reece v.
24 Island Treasures Art Gallery, Inc., 468 F.Supp.2d 1197, 1204 (D. Haw. 2006). The court
25 then "must define the scope of the plaintiff's copyright-that is, decide whether the work is
26 entitled to 'broad' or 'thin' protection," based on whether the majority of the elements are
27 protected. Id.; Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003).

28 While copyright protection has been afforded to photographs, not all aspects of a

1 photograph are protected. “The protectable elements of a photograph generally include
 2 lighting, selection of film and camera, angle of photograph, and determination of the
 3 precise time when the photograph is to be taken.” Reece, at 1206, citing 1 Melville B.
 4 Nimmer & David Nimmer, *Nimmer on Copyright*, § 2.08[E][1], at 2-130 (1999). The Ninth
 5 Circuit has stated that elements that may be afforded copyright protection in a photograph
 6 include “ ‘selection of subject, posture, background, lighting, and perhaps even perspective
 7 alone as protectible elements of a photographer’s work.’ ” Los Angeles News Service v.
 8 Tullo, 973 F.2d 791, 794 (9th Cir. 1992) quoting United States v. Hamilton, 583 F.2d 448,
 9 452 (9th Cir.1978).³ Other circuits have provided similar holdings as to what elements of
 10 a photograph are protected. In Leibovitz v. Paramount Pictures, Corp., 137 F.3d 109, 116
 11 (2d Cir. 1998), the court held that a photographer is entitled to protection for “such artistic
 12 elements as the particular lighting, the resulting skin tone of the subject, and the camera
 13 angle that she selected.” Id. at 116.

14 Of course, to be protected the elements of a photograph must be original. “A
 15 copyright in a photograph derives from ‘the photographer’s original conception of his
 16 subject, not the subject itself.’ ” Psihoyos v. National Geographic Society, 409 F.Supp.2d
 17 268, 275 (S.D.N.Y. 2005) quoting Kisch v. Ammirati & Puris Inc., 657 F.Supp. 380, 382
 18 (S.D.N.Y.1987). Leibovitz, supra, concerned the use of a photograph of a pregnant Demi
 19 Moore taken by the plaintiff, Annie Leibovitz, that appeared on the cover of *Vanity Fair*. The
 20 defendant movie studio commissioned a billboard campaign for the film “Naked Gun 33

21
 22 ³ With respect to “perspective alone” as a potentially protected element of a
 23 photograph, it is unclear what is meant and where such authority was derived. That
 24 comment first appeared in United States v. Hamilton, a case involving the criminal
 25 copying and selling of a copyrighted map. In holding that a map could be afforded
 26 copyright protection, the Court made a passing comment regarding protectable
 27 elements of a photograph and generally cited two cases, Burrow-Giles Lithographic Co.
 28 v. Sarony, 111 U.S. 53 (1884) and Time, Inc. v. Bernard Geis Associates, 293 F.Supp.
 130, 141-43 (S.D.N.Y.1968), neither of which state or stand for proposition that
 “perspective alone” may be a protectable element of a photograph. Several decisions
 have quoted the language from United States v. Hamilton, but there has not been any
 explanation as to what “perspective alone” means and there has been no explanation
 as to the basis for that proposition or why it should be upheld.

1 1/3,” which included images of the movie’s male star’s head attached to a pregnant female
 2 body, which bore significant resemblance the photograph taken by Leibovitz. The
 3 subsequent work was created by photographing a different pregnant model, but “[g]reat
 4 effort was made to ensure that the photograph resembled in meticulous detail” the original.
 5 Id. at 111. While undertaking a fair use analysis, the court discussed the protected
 6 elements of Leibovitz’s photograph and held that Leibovitz was not entitled any protection
 7 for the “photograph of a nude, pregnant female. Only the photographer’s particular
 8 expression of such a body is entitled to protection.” Id. at 115-16. With respect to the pose
 9 struck by Demi Moore, which was reminiscent of Botticelli’s “Birth of Venus,” the Leibovitz
 10 court held that “the basic pose of a nude, pregnant body and the position of the hands, **if**
 11 **ever protectible**, were placed into the public domain by painters and sculptors long before
 12 Botticelli.” Leibovitz, 137 F.3d at 115 (emphasis added). Similarly, in Bill Diodato
 13 Photography, LLC v. Kate Spade, LLC, 388 F.Supp.2d 382, 392-393 (S.D.N.Y. 2005), the
 14 court held that the positioning of a woman’s legs while seated on the toilet with her feet in
 15 high heels were slightly pointed inward, while seemingly unique and unnatural, was “clearly
 16 not original” as other similar images had been published.

17 In Reece, *supra*, the plaintiff had taken and marketed a photograph of a woman
 18 performing a particular hula movement on the beach. The defendant had created and
 19 displayed a stain glass art-work depicting a woman in similar garb on the same beach
 20 performing the same hula movement from the same angle. Reece, 468 F.Supp.2d at 1200-
 21 1201.⁴ The Court held that “the protected elements of Plaintiff’s [photograph] are limited
 22 to those that derive from the Plaintiff’s expression of the idea of a hula dancer performing
 23 the ‘ike motion. Plaintiff’s expression of those ideas include the angle, timing, and lighting
 24 _____

25 ⁴ See also Reece at 1204: “Each [work] captures a woman performing hula
 26 on the beach, kneeling in the sand in the midst of an ‘ike movement, with the right arm
 27 outstretched and an open left hand against the face. The women are each adorned in
 28 the traditional hula kahiko fashion and their long dark hair flows behind them. And each
 image presents the woman from the same angle and orientation, from a perspective
 that is facing the left side of her body, as if in profile.”

1 of the photograph, as well as the expression of the hula kahiko performance and dress.”
 2 Id. at 1206. The Court then went on to explain that elements particular to the hula tradition
 3 are *scènes à faire*. Id. at 1207. The *scènes à faire* doctrine holds that “when similar
 4 features are indispensable and naturally associated with, or at least standard, in the
 5 treatment of given idea, they are treated like ideas and are therefore not protected by
 6 copyright.” Id. at 1206-1207 citing Rice, *supra*, 330 F.3d at 1175 and Apple Computer, Inc.,
 7 35 F.3d at 1444. Thus, despite the obviously similarity between the photograph and the
 8 stain glass art-work, the Court held that the Plaintiff could not demonstrate the likelihood
 9 that he would prevail on his copyright infringement claim for purposes of an injunction.

10 With these concepts in mind, it is clear that few of the Photograph’s elements that
 11 may be protected were incorporated into Guetta’s works, and the few protectable aspects
 12 that were incorporated were unoriginal and, therefore, not protected. With respect to the
 13 Records Work, Stencil Works and Banner Work, by essentially only using an outline of the
 14 features of Run-DMC, Guetta’s works eliminate the technical aspects of the photograph
 15 including the choice of camera and film, lighting, shading, the subjects’ resulting skin tone.
 16 The Photograph’s crisp black and white qualities have been eliminated. There is no
 17 nuanced shading in the subjects’ skin tone. Similarly, the Old Photo Work, which only
 18 incorporates two members of Run-DMC, has a sepia tone and does not reflect the crisp
 19 black and white imagery of the Photograph. The background of Photograph was not
 20 incorporated into any of Guetta’s works. Run-DMC’s pose is not protected as it is not
 21 original: one member with his fist cupped, another other with his arms crossed. These
 22 poses were put into the public domain long before the Photograph was taken. Indeed, the
 23 pose of the member on the right of the Photograph (Run) is commonly referred to as the
 24 “B-Boy Stance” in hip-hop culture and Friedman testified that he had seen Run posed in
 25 the “B-Boy Stance” previously. DMF No. 61. Friedman “quite possibly” told the member on
 26 the left (DMC) to cup his fist and could only testify that he “most likely” put the group in their
 27 precise pose. DMF No. 62.

28 Additionally, pursuant to the *scènes à faire* doctrine, the elements of a photograph

that “follow naturally from the work’s theme rather from the author’s creativity” are also not protected. Psihoyos, *supra*, 409 F.Supp.2d at 274. Run-DMC’s pose in the Photograph is entirely conventional when compared to the countless other photographs of Run-DMC above that display similar bravado. Friedman admitted that Run-DMC tended to wear matching clothes prior to the Photograph being taken and that Friedman did not come up with that idea (or the use of Stetsons). Accordingly, the limiting doctrine of *scènes à faire* further weighs against copyright infringement and the Photograph should be provided only “thin” protection, as the elements incorporated into Guetta’s works are not protected.

Additionally, certainly with respect to the Old Photo Work, there is at least a triable question of fact as to whether the intrinsic test for substantial similarity would support a finding of no copyright infringement. The intrinsic test “asks whether an ‘ordinary, reasonable observer’ would find a substantial similarity of expression of the shared idea.” Smith, *supra*, 54 F.3d at 1218. Clearly, an ordinary, reasonable observer may find that the Photograph of Run-DMC does not share substantial similarity of expression with the Old Photo Work, which contains two altered images of the members of Run-DMC with two family members from the 19th century.

Without a doubt, Friedman has not demonstrated that there is no triable issue of copyright infringement.

C. FAIR USE

Guetta may also defeat Friedman’s motion for summary adjudication by demonstrating that a triable issue exists with respect to his fair use defense. The Copyright Act of 1976 (17 U.S.C. §§ 101-803) first codified the fair use defense to copyright infringement. Id. at § 107. When an alleged infringer’s use is fair it “is not an infringement of copyright.” Id. 17 U.S.C. § 107 enumerates the following four non-exclusive factors that are to be considered in determining whether use of a copyrighted material is fair:

“(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

“(2) the nature of the copyrighted work;

1 “(3) the amount and substantiality of the portion used in relation to the
2 copyrighted work as a whole; and

3 “(4) the effect of the use upon the potential market for or value of the
4 copyrighted work.”

5 The court must balance each of these factors to determine whether the use was fair.
6 Mattel, Inc., *supra*, 353 F.3d at 800 (“To determine whether a work constitutes a fair use,
7 we engage in a case-by-case analysis and a flexible balancing of relevant factors.”).

8 The seminal case in the modern application of the fair use doctrine is Campbell v.
9 Acutt-Rose Music, Inc., 510 U.S. 569 (1994). The U.S. Supreme Court in Campbell
10 analyzed the public policy underlying the fair use doctrine: “From the infancy of copyright
11 protection, some opportunity for fair use of copyrighted materials has been thought
12 necessary to fulfill copyright’s very purpose: ‘To promote the Progress of Science and
13 useful Arts.’ ” Id. at 575, quoting Article I of the United States Constitution. The court
14 explained that while providing authors with a monopoly over their creative works provided
15 incentive for creating them, the fair use doctrine was created so as “ ‘to avoid rigid
16 application of the copyright statute when ... it would stifle the very creativity which that law
17 is designed to foster.’ ” Id. at 577 quoting Stewart v. Abend, 495 U.S. 207, 236 (1990).

18 With respect to the first fair use factor, the purpose and character of the use,
19 Campbell court explained that a chief question is whether the work is “transformative,”
20 whether the new work simply “supercedes the objects” of the original work or if the use
21 “adds something new, with a further purpose or different character, altering the first with
22 new expression, meaning or message.” Campbell, at 579. In other words, whether the use
23 is “supplanting” the original. Id. Although an important factor, a finding that a use is
24 transformative is not necessary to prevail on a fair use defense. Id. Whether the use is
25 commercial is also a consideration under the first fair use factor, but is weighed on a sliding
26 scale with the degree to which the use is transformative. Id.

27 As to the second fair use factor, the nature of the copyrighted work, Campbell
28 recognized “that some works are closer to the core of intended copyright protection than

1 others, with the consequence that fair use is more difficult to establish when the former
2 works are copied.” Id. at 586. Addressing the amount and substantiality of the portion used,
3 the third fair use factor, the Campbell court explained that the analysis “calls for thought
4 not only about the quantity of the materials used, but also about their quality and
5 importance, too.” With respect to the fourth fair use factor, effects on the market for and
6 value of the copyrighted work, Campbell held that the “cognizable harm is market
7 substitution” and that there is no presumption of market harm, even when a commercial
8 use has been established. Id. at 570.

9 Since Campbell, only a handful of decisions have applied the fair use doctrine in
10 cases involving the artistic use of copyrighted photographs. The material facts presented
11 in Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006), are substantially similar to those
12 presented in the instant action. In Blanch, the defendant Koons was a so called
13 “appropriation artist,” one who incorporates existing copyrighted materials into his art
14 works. At issue was a piece Koons created that was commissioned by Deutsche Bank for
15 display in Germany entitled “Niagra,” a painting that consisted of “fragmentary images
16 collaged against the backdrop of a landscape.” Id. at 247. Koons employed a process
17 similar to Guetta in creating his work: he took images of four pairs of women’s legs taken
18 from fashion magazines and scanned them into a computer, made certain modifications
19 to the images and then used them as the foreground for “Niagra.” The background
20 consisted of images of pastries such as brownies, donuts and danishes. The copyright
21 owner of the image of one of the pair of legs used in the foreground filed suit. Her picture
22 originally appeared in Allure magazine and it included a woman’s lower legs and feet
23 resting in a man’s lap in a first-class airplane cabin.

24 In addressing the test set forth in Campbell as to whether the use merely
25 superceded the original work or if it altered the original with new expression, meaning or
26 message, the Blanch court held:

27 “The test almost perfectly describes Koons’s adaptation of [the original work]:
28 the use of a fashion photograph created for publication in a glossy American

1 'lifestyles' magazine with changes of its color, the background against which
2 it is portrayed, the medium, the size of the objects pictured, the objects' details
3 and, crucially, their entirely different purpose and meaning-as part of a
4 massive painting commissioned for exhibition in a German art-gallery space.
5 We therefore conclude that the use in question was transformative."

6 Id. at 253.

7 In addition to determining that Koons' work was transformative, the Blanch court
8 considered the commercial nature of the use in addressing the first fair use factor. Citing
9 Campbell, the Blanch court rejected that idea that the commercial nature of a use of
10 copyrighted material could be dispositive on its own, as nearly all secondary uses are
11 generally conducted for commercial reasons. Id. at 254 quoting Campbell, 510 U.S. at 584.
12 Accordingly, the court in Blanch did not give much weight to the commercial nature of
13 Koons' work. Blanch, 467 F.3d at 254. Moreover, the Blanch court explained that fair use
14 is more likely to exist where the use "produces a value that benefits the broader public
15 interest." Id. at 253. The court held that the exhibition of the defendant's work in the
16 German bank constituted a public benefit, further reducing the commercial nature of the
17 use. Id. at 254.

18 The final aspect considered by the Blanch court in determining which party the first
19 factor favored was Koons' alleged bad faith in using the photograph. The court held that
20 this consideration is essentially meaningless, as no permission to use a work is necessary
21 if the use is fair. Id. at 256, citing Campbell, 510 U.S. at 585, n. 18.

22 As to the second fair use factor, the Blanch court explained that there are two main
23 inquiries: whether the original work is creative or banal and whether the original was
24 published or not. Blanch, 467 F.3d at 256. Although disagreeing with the trial court's
25 assessment that the original photograph was banal and accepting that it was creative, the
26 Blanch court nonetheless held that it had little impact on the overall analysis. Id. at 257
27
28

1 citing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006)⁵
 2 and Campbell, 510 U.S. at 586.

3 In holding that the amount of the original that was used was reasonable, the third
 4 fair use factor, the Blanch court noted that Koons did not “copy those aspects of [the
 5 original work] ‘whose power lies in [the plaintiff’s] individualized expression.’ ” Blanch, 467
 6 F.3d at 257-58 quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563
 7 (1985). The plaintiff in Blanch testified that her key creative decisions were the airplane
 8 setting and placement of the legs on a male lap, background features that were not used
 9 in the work Koons created. Blanch, 467 F.3d at 258.

10 Finally, with respect to the fourth fair use factor, market effects, the Blanch court,
 11 quoting NXIVM Corp. v. Ross Inst., 364 F.3d 471, 481-82 (2d. Cir. 2004), explained that
 12 “ ‘our concern is not whether the secondary use suppresses or even destroys the market
 13 for the original work or its potential derivatives, but whether the secondary use usurps the
 14 market of the original work.’ ” Additionally, quoting Campbell, 510 U.S. at 592, the court
 15 held that “[t]he market for potential derivative uses includes only those that creators of
 16 original works would in general develop or license others to develop.” Blanch, 467 F.3d at
 17 258. The plaintiff had never subsequently published the photograph after its initial
 18 appearance in *Allure* and had never licensed any of her works for use in other artistic
 19 mediums. The court found that the use of her work by Koons did not cause harm to the
 20 value of the original photograph or any other photographs the plaintiff took, and the use did
 21 not harm the plaintiff’s career in any manner. Therefore, the Blanch court held that the use
 22 “had no deleterious effect” upon the potential market for the photograph. Id.

23 Leibovitz, *supra*, also concerned a fair use defense in an action wherein an original
 24 photograph was used in a subsequent work. As explained above, that case involved a
 25 movie studio’s commissioning of a billboard campaign for the film “Naked Gun 33 1/3,” that
 26

27 ⁵ In Bill Graham Archives, the court, quoting Campbell at 586, held “the
 28 second factor is not ‘likely to help much in separating the fair use sheep from the
 infringing goats ... ’ ” 448 F.3d at 612.

1 was similar to the photograph of Demi Moore taken by Leibovitz. The court held the first
 2 factor favored fair use, despite “some discount due to the fact that it promotes a
 3 commercial product.” Id. at 115. As with Campbell and Blanch, the court gave little weight
 4 to the second factor. Id.

5 In discussing the third factor pertaining to the amount and substantiality of the use
 6 of the original work, the court stated that “consideration must be given not only to the
 7 quantity of the materials taken but also to ‘their quality and importance’ to the original
 8 work.” Id. at 114 quoting Campbell, 510 U.S. at 587. The court further stressed that in
 9 considering the third factor, only **protected elements** of the original are to be considered.
 10 Leibovitz, 137 F.3d at 115. The court held that Leibovitz was not entitled to any protection
 11 for the “photograph of a nude, pregnant female. Only the photographer’s particular
 12 expression of such a body is entitled to protection” and explained that a photographer is
 13 entitled to protection for “such artistic elements as the particular lighting, the resulting skin
 14 tone of the subject, and the camera angle that she selected.” Id. at 115-116. Again, with
 15 respect to Demi Moore’s pose, the Court held that “the basic pose of a nude, pregnant
 16 body and the position of the hands, **if ever protectible**, were placed into the public domain
 17 by painters and sculptors long before Botticelli.” Id. at F.3d at 115 (emphasis added). While
 18 the court in Leibovitz held that the defendant used more of the protected features of the
 19 plaintiff’s photograph (lighting, skin tone, etc.) than necessary to achieve its goals, that still
 20 was not sufficient to determine that the third factor favored the plaintiff.

21 As to the fourth factor, the only market harm alleged by Leibovitz was that she had
 22 been deprived of a licensing fee for using her work as an advertisement, but the court held
 23 that she was not entitled to a licensing fee for a work that otherwise qualifies as fair use.
 24 Id. at 117, citing Campbell at 592.

25 Based on the foregoing, the following fundamental propositions regarding the fair
 26 use defense to copyright infringement may be extrapolated:

27 (1) With respect to the first factor (purpose and character of the use), the primary
 28 concerns are whether the work is transformative (i.e. “adds something new, with a further

purpose or different character, altering the first with new expression, meaning or message”) and whether there is a commercial nature to the use;

(2) The second factor (nature of the copyrighted work) is given little weight;

(3) As to the third factor (amount of copyrighted work that is used), only **protected** elements of the copyrighted work are to be considered. In the case of photographs, these elements tend to be the lighting, film, camera and other choices photographers make and the resulting skin tones and shading of the photographs; and

(4) With respect to the fourth factor (market effects), the use must have a “deleterious effect” upon the copyrighted material’s potential market for favor a finding that a use was not fair.

D. APPLICATION OF THE FAIR USE DEFENSE TO GUETTA’S WORKS

1. The Old Photo Work

The Old Photo Work, which consists of the photograph of the 19th century family with two members of Run-DMC included, is unquestionably transformative. The artistic interpretations that can be ascribed to the Photograph and the Old Photo Work are entirely different. The Photograph typifies the kinds of images of Run-DMC that were created and disseminated in the 1980s: it shows a streetwise hip-hop group, full of machismo. Many similar photographs were created throughout the group’s tenure in order to transmit the group’s image. The purpose of those photographs was to appeal to consumers of hip-hop culture and create market demand for Run-DMC’s brand. Friedman testified that his purpose in creating the Photograph was to inspire others as he had been inspired by Run-DMC’s music.

The Old Photo Work cannot possibly be seen as a work to inspire hip-hop enthusiasm the way Friedman intended. The inclusion of the 19th century family with their faces and bodies conveying little emotion sharply contrasts with the bravado displayed by the images of the Run-DMC members. The Old Photo Work can reasonably be seen as poking fun at the “tough-guy” image Run-DMC and countless other hip-hop acts have used to promote themselves. Another reasonable interpretation is that Old Photo Work is

1 mocking the modest nature of the 1800's family and the society in which they existed. A
 2 viewer may see the Old Photo Work as posing the question: what would it be like if the
 3 paragon of modern-day bravado was sent back in time to a more restrictive era? The
 4 contrast of the images of Run-DMC and 19th century persons is undeniable. The Old
 5 Photo Work may also implicate thoughts regarding race relations through different eras.
 6 A multitude of reasonable interpretations may be drawn from the Old Photo Work. On the
 7 other hand, the Photograph is closed to such a wide array of artistic meanings. Clearly, the
 8 Old Photo Work has not simply supplanted the Photograph and has added "something
 9 new, with a further purpose or different character, altering the first with new expression,
 10 meaning or message." Campbell, 510 U.S. at 579. Therefore, the Old Photo Work is
 11 substantially transformative.

12 With respect to the commercial nature of the Old Photo Work, Guetta did not
 13 receive a six-figure commission to create the work, as did Koons with respect to the work
 14 at issue in Blanch (wherein the court determined the first fair use factor favored the
 15 defendant),⁶ although Guetta did sell some prints of the Old Photo Work. Moreover, as with
 16 the work at issue in Blanch, the Old Photo Work was displayed in a public forum (with no
 17 admission fee), thereby creating "a value that benefits the broader public interest." Blanch,
 18 467 F.3d at 253. Furthermore, in light of the highly transformative nature of the Old Photo
 19 Work, the commercial nature of the Old Photo Work is discounted. Id. at 254.

20 With respect to the Old Photo Work, the first fair use factor clearly weighs in favor
 21 of Guetta. Moreover, as the Old Photo Work is substantially transformative, the remaining
 22 fair use factors must be given less consideration.

23 As with each of the cases cited above, the court should not give much weight to the
 24 second fair use factor as "the second factor may be of limited usefulness where the
 25 creative work of art is being used for a transformative purpose." Bill Graham Archives, 448
 26 _____

27 ⁶ In Blanch, it was determined that Koons' net compensation attributable
 28 solely to the work at issue (i.e. not including several other works that Koons created
 around the same time for the same German bank installation) was \$126,877. 467 F.3d
 at 248.

1 F.3d at 612.

2 The third fair use factor, amount and substantiality of the copyrighted work used,
 3 clearly weighs in favor of Guetta. Old Photo Work consists primarily of the 19th century
 4 photograph with two of the family members removed and the inclusion of images of two
 5 Run-DMC members from the Photograph that have been somewhat altered. The
 6 background of the Photograph is not used at all. Moreover, the Old Photo Work does not
 7 capture the elements attributable to Friedman's decisions regarding lighting, lens and
 8 shutter-speed, which give the Photograph its particular expression, including color, clarity
 9 and the subjects' resulting skin tone. Here, all of those individualized aspects of the
 10 photograph have been eliminated. The shading and crisp black and white imagery of the
 11 Photograph is gone. The images of the two Run-DMC members are muted and given the
 12 same sepia tone as the 19th century photograph. The skin tone of the members of Run-
 13 DMC does not resemble the result Friedman captured in the Photograph. Based simply on
 14 the image's color and appearance (and considering the temporally inappropriate clothing),
 15 a viewer would assume the subjects of the Old Photo Work, including the two Run-DMC
 16 members, were photographed with a camera well over a hundred years old, rather than
 17 with photography equipment available during the 1980's.

18 Run-DMC's pose is not protected. First of all, it is unlikely that any pose is ever
 19 protectible. Leibovitz, *supra*, 137 F.3d at 115. Moreover, the posing of the members of
 20 Run-DMC in the Photograph is not particularly original: one member with his fist cupped,
 21 another other with his arms crossed in the "B-Boy stance." By Friedman's own admission,
 22 the poses were put into the public domain before the Photograph was taken and Run-DMC
 23 had already posed similarly in photographs. Friedman does not have a protected interest
 24 in the generic tough-guy pose depicted in the Photograph. Friedman's choice of
 25 background was not incorporated at all.

26 Much of the Photograph was not used creating in the Old Photo Work and none of
 27 the Photograph's *protected* expression was used. The third factor favors fair use.

28 As to market effects, it is hard to fathom how the Old Photo Work could possibly

1 usurp the market for the Photograph. Indeed, Friedman testified that he is not aware of the
 2 lack of any purchase or use of the Photograph due to Guetta's use. Moreover, any person
 3 that wants a copy of Friedman's Photograph will undoubtedly be unsatisfied with the Old
 4 Photo Work, as it excludes one of Run-DMC's members and includes two unidentified
 5 people from the 1800's and does not depict the lighting, skin tone and other subtleties of
 6 the Photograph. The Photograph is a glossy depiction of a rap group full of hubris, the Old
 7 Photo Work is something completely different. To the extent the Old Photo Work usurped
 8 the market for photographs of Run-DMC, the right to publicity lies with the group and
 9 Friedman has no standing to assert a claim on their behalf. Also, to the extent that the
 10 market for the Photograph has been diminished because of any perceived criticism
 11 contained in Old Photo Work, as with a "lethal parody" or "scathing theater review," no
 12 cognizable harm under the Copyright Act is produced. Campbell, 510 U.S. at 591-592.

13 Finally, the Old Photo Work may actually produce interest in the Photograph to the
 14 extent people are interested in the images Guetta has incorporated into his works, thereby
 15 positively affecting the market for the Photograph.

16 Simply stated, the markets for the Photograph and the Old Photo Work are different
 17 and the Old Photo Work has not become a market replacement for the Photograph or the
 18 books in which it appears. Therefore, the fourth fair use factor also favors Guetta.

19 Based on the foregoing, the Old Photo Work's use of the Photograph was fair.

20 **2. The Broken Records Work**

21 In addition to being transformative, as explained below, the first fair use factor
 22 strongly favors Guetta with respect to the Broken Records Work (the piece consisting of
 23 over 1,000 pieces of broken records) as there is no commercial aspect to the use. Unlike
 24 the Old Photo Work, the Broken Records Work was never offered for sale in any manner.
 25 Other than being displayed at the "Life is Beautiful" show for approximately two and a half
 26 months in the Summer of 2008, the Broken Records Work was not displayed or used for
 27 any commercial purpose. Guetta was not paid to put on the show and admission was free.
 28 The Broken Records Work was never used promote Guetta or his work. Rather than

1 capitalizing financially, Guetta served a broader public interest by displaying his art.

2 Additionally, the use was transformative. Given that the Broken Records Work was
3 only displayed at the “Life is Beautiful” show, it must be viewed in that context. The Broken
4 Records Work was one of approximately 200 pieces that were displayed during the
5 installment. As with the image of the poster used in the book in Bill Graham Presents, the
6 copyrighted image made up only a tiny fraction of the entire show, which contained many
7 more works that were far more grandiose. Therefore, the use was inconsequential. Bill
8 Graham Presents, 448 F.3d at 611. Additionally, the background of the Photograph has
9 been omitted, as have all the protected elements attributable to Friedman such as skin
10 tone, shading and detail. Moreover, the Broken Records Work applies the image of Run-
11 DMC to an entirely new medium. The broken records create a topographical component
12 to the work. In addition to an aesthetic change, the use of records can provide the viewer
13 with various interpretations of the work that cannot reasonably be applied to the
14 Photograph. One may understand the Broken Records Work to be a commentary on the
15 declining state of the recording business with its use of records, a listening format many
16 consider to be outdated, that are broken. The use of records may also be seen as an
17 homage to the importance vinyl records played in the development of hip-hop culture.
18 Again, numerous reasonable artistic interpretations may be attributed to the Broken
19 Records Work that cannot be attributed to the Photograph. Therefore, the Broken Records
20 Work is transformative. As discussed previously, the second fair use factor should not be
21 given much weight.

22 As to the third factor, while the Broken Records Work uses each of the members
23 of Run-DMC, it does not use any of Friedman’s protected expression in their images.
24 Again, through the process of creating the piece, all shading and detail has been removed.
25 Any of Friedman’s artistic choices as a photographer are not present in the Broken
26 Records Work.

27 It is all but impossible for the Broken Records Work to have any effect upon the
28 market for the Photograph. It is not fathomable that a person with some interest in

1 purchasing the Photograph (or a book containing the Photograph) would refrain from doing
 2 so because of the display of the Broken Records Work at an art exhibit. No person's
 3 appetite for the protected aspects of the Photograph would be satiated by the temporary
 4 showing of a piece entirely devoid of Friedman's artistic input.

5 **3. The Stencil Works**

6 Only one of the Stencil Works was ever displayed during the "Life is Beautiful"
 7 exhibition and the images were never offered for sale in any manner, so there is no
 8 commercial use associated with those works. Additionally, the work that was displayed is
 9 transformative as it was only a tiny fraction of the patchwork making up the "Life is
 10 Beautiful" show and must be viewed in that context. Again, the second fair use factor
 11 should be given little weight. With respect to the third factor, as with the other works
 12 previously addressed, the Stencil Works do not use the Photograph's protected
 13 expression. The background, Run-DMC's skin tone and all other details provided by
 14 Friedman's artistic decisions as a photographer have been eliminated. As with the Broken
 15 Records Work, the display of the one Stencil Work at an exhibition would not have a
 16 deleterious effect on the market for the Photograph.

17 **4. The Banner Work**

18 The Banner Work was sold, but still displayed after it was sold. Accordingly, it has
 19 both a commercial and non-commercial character. As with the other works, the protected
 20 elements of the Photograph are not incorporated. Finally, the display of the Banner Work
 21 at art shows cannot have a deleterious effect on the market for the Photograph.

22 **IV. CONCLUSION**

23 Based on the foregoing, Friedman's motion for summary adjudication must be
 24 denied.

25 Dated: April 18, 2011

LAW OFFICES OF ALAN S. GUTMAN

/s/ Alan S. Gutman

27 By: _____
 Alan S. Gutman

Attorneys for Defendant and Counter-Claimant
 THIERRY GUETTA a/k/a MR. BRAINWASH